Supreme Court, U.S.
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No. 91-2030

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RICHARD M. PACHULSKI,

Petitioner,

v.

TOPA THRIFT AND LOAN ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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I.

ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

Respondent Topa Thrift and Loan Association ("Topa") proposes this Statement of Questions Presented for Review, since Topa does not consider the Questions Presented by Petitioner to concisely and accurately state the scope of such issues.

1. Did the District Court abuse its discretion in disregarding Petitioner's late-filed Opposition to Summary Judgment motion, which was filed one week after a Court ordered deadline, which had previously been extended six weeks for the convenience of Petitioner's counsel?

2. Did the District Court have the power to disregard Petitioner's late-filed Opposition to Topa's Motion for Summary Judgment, and to deem Petitioner to have consented to the granting of summary judgment pursuant to the Local Court Rules, after making a determination that the moving summary judgment papers established the non-existence of any triable issues of material fact?

3. (i) Did the District Court fail to consider whether Topa's moving papers on summary judgment proved the non-existence of a material, genuine issue of

fact; and (ii) if the District Court failed to consider whether a genuine material issue of fact existed, was Petitioner thereby denied the right to a jury trial by the grant of summary judgment in Topa's favor?

4. Did the District Court abuse its discretion in denying Petitioner's Motion to Vacate the Judgment of the District Court on Topa's Motion for Summary Judgment?

II.

STATEMENT OF THE CASE

A. Nature of the Case.

This case was brought in Bankruptcy Court as an adversary claim by Petitioner Richard M. Pachulski ("Pachulski"), the trustee in bankruptcy, against an institutional lender and various employees thereof, for breach of fiduciary duty, breach of the duty of good faith and fair dealing, fraud, RICO violations, conspiracy and cancellation of a trustee's deed. The case arose in connection with a construction loan made by Topa to the debtor, Douglas D. Gross ("Gross"). Gross claimed that Topa had fraudulently induced him to enter into the construction loan contract, and then had mismanaged the loan, causing him damages and ultimately the loss of the real property which he had pledged as security for the loan. Topa asserted that it did not defraud Gross or mismanage the loan, and that it had no duty owed to Gross which it breached.

Topa filed a Motion for Summary Judgment. Pursuant to the request of plaintiff Richard M. Pachulski ("Pachulski"), the parties entered into a Stipulation and the Court ordered that Pachulski was granted a 42 day extension of time to respond to the Motion for Summary Judgment. Despite this extension, Pachulski still failed to file a timely response to Topa's Motion. After Topa obtained a summary judgment in its favor, Pachulski brought a Motion to Vacate the Judgment under F.R.Civ.P.60(b). Pachulski now appeals the Judgment and denial of his Motion to Vacate the Judgment.

B. Statement of Facts.

On April 23, 1985, Pachulski filed a Complaint as an adversary proceeding in Bankruptcy No. LA-83-18098-BR. (CDN-1)[1] A notice of pending action regarding certain real estate known as 606 South Plymouth Boulevard, Los Angeles, California was recorded on April 24, 1985. Service of this first Summons and Complaint was ultimately quashed on August 23, 1985, and Topa obtained an order expunging the lis pendens on September 6, 1985. (CDN-11, 12) Plaintiff filed a First Amended Complaint on February 27, 1986. (CDN-15) Defendants filed a Motion to Dismiss the First Amended Complaint, Or, In the Alternative, for a More Definite Statement. (CDN-16, 17) The Motion to Dismiss was denied and the Motion for a More Definite Statement was granted on May 8, 1986. (CDN-20) Plaintiff's Second Amended Complaint and Demand for Jury Trial was filed on May

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[1]The notation "CDN-#" refers to the District Court Clerk's Docket Number assigned to the referenced document. Here, the Complaint was assigned Clerk's Docket Number 1.

14, 1986. (CDN-21) Defendants answered the Second Amended Complaint on July 15, 1986. (CDN-22)

On October 15, 1986 defendants filed a Motion to Dismiss the Case or for Abstention. (CDN-25) The Motion came before Bankruptcy Judge Barry Russell on November 10, 1986. However, by order dated December 2, 1986, the case was remanded to the United States District Court for the Central District of California, and defendants' Motion to Dismiss or to Abstain was not ruled upon by the Bankruptcy Court. (CDN-28)

On February 6, 1987 Pachulski voluntarily dismissed all claims against defendant Kurt Mann with prejudice. (CDN-29)

Nothing transpired in this case for approximately two and a half years, until the District Court set a status conference on May 4, 1989. (CDN-32) On July 31, 1989 the District Court heard argument on defendants' Motion to Dismiss, Or, Alternatively, to Abstain. The Motion was denied by the District Court's Order of August 21, 1989. (CDN-44)

On September 11, 1989, the parties stipulated and the Court ordered that the Fourth Cause of Action of the Second Amended Complaint for RICO violations and the Fifth Cause of Action for Conspiracy be dismissed with prejudice. (CDN-46) The Court also ordered that the entire Second Amended Complaint be dismissed with prejudice against all defendants except Topa, Peoples Investment and Loan Association and Pasadena Thrift and Loan Association. (Id.)

On November 13, 1989 defendants Topa Thrift and Loan Association and People's Investment and Loan Association filed a Motion for Summary Judgment. (CDN-50) Pursuant to a Stipulated Order, for the convenience of Pachulski's counsel, the due date for Plaintiff's Opposition to Topa's motion was extended six weeks from November 20, 1989 to December 26, 1989. (CDN-55) Pachulski failed to file a timely opposition to the Motion for Summary Judgment, and filed an application to file a late opposition on December 27, 1989, after his opposition was due. (CDN-58) The record shows no attempt by Petitioner's counsel before the filing deadline to inform the Court or counsel of any difficulties he was experiencing. This application was denied. (CDN-65) Pachulski's subsequent application to enlarge time to file an opposition was also denied, and the Motion for Summary Judgment was granted on its merits on January 11, 1990. (CDN-68) Judgment was entered in favor of defendants and against Pachulski on February 6, 1990. (CDN-69 and 79; Supplemental Excerpts of Record, No. 1, pg. 26).

On December 27, 1989, the day after Petitioner's opposition was due to be filed, Petitioner submitted an Ex Parte Application to Extend Time to file an Opposition to the Motion for Summary Judgment. (CDN-58) This Application was denied on January 4, 1990. (CDN-66) On January 8, 1990, Petitioner filed a second Ex Parte Application to Enlarge Time and to permit his opposition papers to be considered. The Court found that Petitioner's counsel was able to prepare opposition papers for a number of other matters during the time period in question. (CDN-68, pp. 4-6) The Court found Petitioner's proposed opposition papers to be 58 pages

long, well in excess of the 35 page limitation of the District Court. (CDN-68, p. 6) Petitioner's counsel never sought nor obtained leave of the Court to permit the filing of over-sized papers. (Id.) On February 26, 1990, Petitioner filed a Motion to Vacate the Judgment, based on Petitioner's counsel's excusable neglect. (ER-78.1) The District Court subsequently found no inadvertence or excusable neglect, and denied plaintiff's Motion to Vacate Judgment. (CDN-79)

On February 13, 1990, Pachulski filed a Notice of Appeal of the Judgment. (CDN-75) On May 17, 1990, Pachulski filed a Notice of Appeal of the Order Denying His Motion to Vacate the Judgment. (CDN-80) These two appeals were subsequently consolidated. The Ninth Circuit Court of Appeals affirmed the District Court's actions on December 13, 1991, and denied Pachulski's Petition for Rehearing on March 19, 1992.

III.

ARGUMENT

A. Summary of Argument.

This case presents no special or important reasons for a grant of a petition for a writ of certiorari. The Ninth Circuit Court of Appeals' unpublished memorandum decision in this matter does not conflict with the decision of another United States Court of Appeals on the same matter. The Ninth Circuit has not departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. Neither

has the Ninth Circuit decided a federal question in a way which conflicts with applicable decisions of this Court.

Topa's Motion for Summary Judgment set forth facts sufficient to entitle Topa to Judgment as a matter of law. Despite Petitioner's repeated unsupported statements to the contrary, the District Court affirmatively found that Topa's moving papers disclosed no triable issues of material fact. Petitioner questions the integrity and truthfulness of the District Court by questioning its explicit pronouncements.

The District Court also properly disregarded Petitioner's late-filed opposition to Topa's Motion for Summary Judgment. Petitioner was granted a six week extension of time within which to file his opposition papers, and he failed to do so. Petitioner's counsel failed to make a showing of mistake or excusable neglect sufficient to gain relief from his failure to file timely opposition papers. Since the Court found Topa's moving papers to be legally sufficient, Petitioner's Motion to Vacate the Judgment was properly denied by the District Court.

Petitioner was granted adequate due process and equal protection under the law, and his rights to freedom of speech were not abridged by the District Court's proceedings.

Petitioner's counsel is incorrect when he states that the District Court failed to consider the merits of Topa's Motion for Summary Judgment. The District Court made specific findings to the contrary. There is therefore no basis for his Petition for a Writ of Certiorari.

B. No Special and Important Reasons Exist for the Granting of a Writ of Certiorari.

The asserted grounds for the petition for a writ of certiorari in this case involve a relatively minor procedural issue, based upon facts which are, at best, questionable. Respondent filed a motion for summary judgment in the District Court. After a substantial extension of tiem, Petitioner failed to file a timely opposition. The Motion for Summary Judgment was granted, and summary judgment entered, after the District Court reviewed the merits of the Motion for Summary Judgment and justifiably disregarded petitioner's late-filed opposition.

Rule 10.1 of the Rules of the Supreme Court outlines some of the factors considered by the Court in determining whether a petition for a writ of certiorari should be granted. Among the factors which the Court might consider, Rule 10.1(a) provides as follows:

> "(a) When the United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an

exercise this Court's power of supervision."

Section 10.1(c) provides that the court may consider a petition when an appellate court has decided a federal question in a way that conflicts with the applicable decisions of this Court.

No "special and important reasons" are presented for the grant of a writ of certiorari in this case. As petitioner's brief points out, there are a number of cases determinative of the issues presented in his petition. The facts contained in the record in this case clearly indicate that the District Court considered Topa's Motion for Summary Judgment on its merits, and determined that there were no triable issues of material fact and that Topa was entitled to summary judgment as a matter of law. The Court exercised its discretion to disregard petitioner's late-filed opposition to the summary judgment motion. This is not a novel question of law. The petition itself discloses a number of cases which have dealt with this situation. Topa concedes that the District Court was required to consider the summary judgment motion on its merits before granting it. However, the record clearly discloses that the District Court did so. In such a case, the memorandum of the Court of Appeals in this case did not conflict with any prior authority, since the motion was meritorious, and petitioner's failure to file an opposition was deemed consent to the granting of the meritorious motion.

In sum, there is no conflict created by the Court of Appeals' decision in this case, and the Court did not abuse its discretion in affirming the proper decision of

the District Court. There was no departure from the accepted and usual course of judicial proceedings in the Appellate Court or the District Court. Grant of a writ of certiorari is not appropriate in such circumstances.

C. The Court Found that Topa's Motion for Summary Judgment was Legally Sufficient and Disclosed No Issues of Material Fact.

Petitioner bases much of his argument on the proposition that the District Court failed to properly consider Topa's Motion for Summary Judgment, thereby granting a summary judgment solely on the basis of a default by Petitioner. Were this true, Petitioner could argue that he is entitled to have the judgment vacated and the Motion remanded to the District Court for further consideration. This proposition, however, is not true.

The record, in numerous places, makes clear that the District Court carefully considered the merits of Topa's Motion for Summary Judgment and affirmatively found that no triable issues of material fact existed. In particular, the Court stated:

> "First of all, unlike the Hamilton case, the summary judgment that was filed in this case by Topa Thrift is and was sufficient on its face.
>
> "The record should be clear that I have reviewed -- did review Topa's Motion for

> Summary Judgment. It was supported by two declarations and numerous exhibits -- about 25 exhibits, all of which appear to be properly authenticated exhibits -- along with a Statement of Uncontroverted Facts, and the Motion appears to be and appears to be at the time well-taken and meritorious. It does not raise and did not raise any triable issues of fact." (Transcript of Proceedings, March 19, 1990, p. 26, lines 5-16 [Supplemental Excerpts of Record, p. 2]) (emphasis added)

Further, the District Court, in the Judgment entered on February 8, 1990, specifically stated as follows:

> "This Court, having considered defendants' Motion for Summary Judgment, and the points and authorities, affidavits and other evidence presented in support thereof, and having found that there is no genuine issue as to any material fact in this case, and that defendants are entitled to a judgment as a matter of law,

> and having on January 11, 1990 filed an Order granting defendants' Motion for Summary Judgment. . . ." (Judgment, p. 1 [CDN-69])

Finally, the District Court, in the Order denying plaintiff's Motion to Vacate Judgment, stated that:

> "Prior to granting the Motion for Summary Judgment, the Court carefully reviewed all papers submitted by defendants in support of said Motion. Based on this review, all documents were properly authenticated and were sufficient as a matter of law for the granting of the Motion for Summary Judgment. See Hamilton v. Keystone Tankship Corp., 539 F.2d 685 (9th Cir. 1976)." (Order Denying Plaintiff's Motion to Vacate Judgment, p. 2 [CDN 79]) (emphasis added)

These citations to the record make clear that, despite Petitioner's counsel's claims to the contrary, the District Court carefully considered the merits of Topa's Motion for Summary Judgment and thereupon properly ordered judgment to be entered in Topa's favor.

D. The District Court Properly Disregarded Petitioner's Opposition.

(1) The Court Has Broad Discretionary Powers to Disregard Late-Filed Papers.

The propriety of a District Court disregarding late-filed papers in opposition to a Summary Judgment Motion has been repeatedly affirmed in recent cases. Pfeil v. Rogers, 757 F.2d 850 (7th Cir. 1985), involved a damage action in which the defendant filed a motion for summary judgment. The plaintiff attempted to file certain evidentiary documents in opposition to plaintiff's motion after the deadline for filing papers had passed. In confirming the validity of the local court rule regarding timely filing of opposition papers, the Court stated as follows:

> "Regarding strict compliance with the local summary judgment rule -- specifying that all material must be filed in accordance with the district court's scheduling order -- furthers the purpose of properly framing the issues and allowing the moving party to respond to all of the resisting party's arguments in its reply brief as well as allowing the trial court to organize and control its calendar in an

orderly manner. The filing deadline therefore assures the court not only that its decisions will be accurate because the issues will have been fully briefed and argued but also that summary judgment motions will be heard in a timely fashion." Pfeil, supra, at 857-858.

The Court then went on to affirm the District Court's refusal to consider plaintiff's late-filed opposition papers:

"Because no colorable reason was given to explain the plaintiff's failure to file his documents before the deadline, the District Court was not compelled to delay the proceeding by considering the late documents and allowing the defendants to respond. The decision to disregard all material submitted after a reasonable filing deadline is certainly not an abuse of discretion because it allowed the district court to preserve the moving party's right to respond to the resisting party's arguments and to decide the summary judgment motion in a timely

fashion. We approve the court's ruling on this issue." Id.

Davidson v. Keenan, 740 F.2d 129 (2d Cir. 1984) also dealt with the propriety of a district court's failure to consider a late-filed opposition to a summary judgment motion. In Davidson, the plaintiffs claimed that their opposition was untimely because they were unable to obtain affidavits from necessary witnesses before the deadline. The Court rejected this argument, stating that it was within the District Court's discretion to disregard a late-filed opposition when plaintiffs made no attempt to obtain an extension of time to file their opposition papers. Davidson at 132.

In Simon v. Kroger Co., 743 F.2d 1544 (11th Cir. 1984), the Court held that a defendant's motion for summary judgment was properly granted, in part because plaintiff failed to file a timely opposition to the motion. In finding that the District Court properly disregarded the opposition to the summary judgment motion, the Court held as follows:

"The district court held that Kroger was entitled to summary judgment on the secondary ground that Simon failed to respond to Kroger's motion for summary judgment until almost three months after a response was required under Local Court Rule 91.2. Simon, although filing an untimely response, did not

> seek an extension of time or leave to file his response late. The district court, therefore, concluded that Kroger's motion for summary judgment was 'unopposed,' within the meaning of Local Court Rule 91.2. Finding no opposition to Kroger's motion, the court granted the motion." Simon at 1546-1547.

(2) Petitioner's Counsel Intentionally And Consciously Disregarded A Court-Ordered Filing Deadline.

The record is clear that the filing deadline for opposition papers to Topa's Motion for Summary Judgment was extended six weeks at the request of Petitioner's counsel and for his convenience. (Stipulation, p. 2, lns. 22-28 [CDN-55]; Order Granting Summary Judgment, p. 4, ln. 25 to p. 5, ln. 6 [CDN-68]) Topa's counsel agreed to accommodate Petitioner's counsel, and the Court entered an Order based on this Stipulation. (Id.) The record shows no attempt by Petitioner's counsel to inform either the Court or Topa's counsel of any problems in meeting the Court ordered, Stipulated filing deadline. After failing to meet the filing deadline, only then did Petitioner's counsel file an Application to File Late Opposition to the Motion for Summary Judgment. (CDN-58)

Not until January 2, 1990, a week after his Opposition was due, did plaintiff submit any proposed opposition papers. (CDN-60) These papers were grossly in excess of the page limitations set by the District Court, and in violation of the Local Rules. (CDN-68, p. 6) After disregarding the Court ordered filing limits the first time, Petitioner was ordered to limit any future briefs in support of a motion to vacate the judgment to 20 pages in length. (CDN-70) Despite his previous violations, and a specific Court Order, Petitioner's counsel proceeded to file a Brief in support of his Motion to Vacate well in excess of the 20 page limit ordered by the Court. (CDN-79, pp. 3-4)

Regarding Petitioner's counsel's neglect in failing to file timely opposition papers, the District Court specifically found that Petitioner's counsel was, "able to research, prepare and file summary judgment opposition briefs in at least several other matters between December 8 through December 26, 1989. He did not get around to lodging opposition papers in the instant action until January 2, 1990." (Order Granting Summary Judgment, p. 3, lns. 13-18 [CDN-68]) Under such circumstances, the District Court properly exercised its discretion in disregarding Petitioner's late filed opposition papers.

The cited authorities make abundantly clear that it was well within the trial court's discretion to disregard these untimely papers filed in opposition to a motion for summary judgment. These cases are strikingly similar to the case at bar. Here, Petitioner's counsel was granted six additional weeks within which to file his opposition papers. This extension of time was granted for Petitioner's counsel's convenience. With full knowledge

of the Court-ordered deadline, Petitioner's counsel failed to a timely opposition to Topa's Motion for Summary Judgment, and failed to request an extension of time for good cause before the deadline had expired. Under such circumstances, the District Court properly disregarded Petitioner's opposition papers in considering Topa's Motion for Summary Judgment.

E. The District Court Properly Denied Petitioner's Motion to Vacate the Judgment; Petitioner Showed No Mistake, Inadvertence, Surprise or Excusable Neglect.

F.R.Civ.P.60(b)(1) provides, in part, that relief may be granted from a judgment or order based upon "mistake, inadvertence, surprise or excusable neglect."

(1) There Is No Authority For Reversing The District Court's Denial of Petitioner's Motion To Vacate.

As outlined, infra, numerous authorities confirm that in a case such as this, where counsel was provided adequate opportunity to respond to a motion for summary judgment, and his only excuses for failure to do so in a timely fashion were the press of other work and a few days of illness, it is within the Court's discretion to deny a motion to vacate a summary judgment based upon inadvertence or excusable neglect. Indeed, Topa has not found, nor has Petitioner cited, any authority in which an appellate court has reversed the trial court's refusal to vacate the summary judgment where opposition to a

motion for summary judgment was not timely filed, and in which the trial court granted such a motion after considering its merits.

(2) The District Court's Discretion in Denying Motions To Vacate Judgment Has Been Consistently Upheld On Appeal.

The Ninth Circuit has previously considered a situation strikingly similar to that of Petitioner herein. In Smith v. Stone, 308 F.2d 15 (9th Cir. 1962), defendants filed a motion for summary judgment, supported by points and authorities and evidence. Pursuant to the request of plaintiff's counsel, the hearing was continued twice, giving plaintiff approximately eight additional weeks to file opposition to the motion. Shortly before the continued hearing, plaintiff's counsel requested an additional continuance, claiming that he had "secretarial trouble" and that he had had the flu the previous week. No opposition was ever filed to defendant's motion for summary judgment. Smith, supra, at 16. The Appellate Court affirmed the District Court's denial of plaintiff's motion to set aside the judgment on the grounds of excusable neglect or inadvertence. The Smith Court began its analysis with the general rule that, "whether there exists a sufficient showing of inadvertence or excusable neglect is purely a matter of discretion with the trial court." Id. at 17-18. The Court went on to characterize Petitioner's claim as follows:

"Counsel for Petitioner
then states because this is an

> important case, he should be excused for his failure to file opposition to the motion to dismiss, and for summary judgment. He shows that illness had nothing to do with his prolonged failure to follow the rules of court. His vacation was more important to him than this 'important' case. He made not the slightest attempt to reach the court, or any attache thereof, at any time prior to the hearing on October 3, 1961. He has made a showing of carelessness and lack of proper regard for his duty as an attorney and an officer of the court, and no showing of inadvertence, excusable neglect, mistake, surprise, nor any one or more of them.
>
> . . .
>
> There must be some obedience to the rules of court; and some respect shown to the convenience and rights of other counsel, litigants, and the court itself." Id. at 18.

A veritable plethora of cases supports the proposition set forth in Smith, that a determination of

excusable neglect under Rule 60(b) is within the sound discretion of the trial court. The following are but a few examples of this.

Dunlap v. Transamerica Occidental Life Ins. Co., 858 F.2d 629 (11th Cir. 1988), dealt with a situation in which defendant filed a motion for summary judgment which plaintiff failed to oppose. In attempting to show excusable neglect in his failure to file an opposition, plaintiff claimed that he did not receive the scheduling order mailed by the Court, which merely set forth the requirements of the local court rule regarding filing of papers in connection with a motion for summary judgment. Dunlap at 631. In affirming the grant of summary judgment, the Court noted that the Trial Court had considered the merits of the motion for summary judgment based upon evidence in the record, and properly denied plaintiff's Motion for Reconsideration, since there was no excusable neglect in plaintiff's failure to file an opposition to defendant's motion. Id. See, also, Simon v. Kroger Co., supra, 743 F.2d 1554 (11th Cir. 1984).

Other cases specifically deal with the situation in which counsel claimed that the press of other business caused excusable neglect. In Picucci v. Town of Kittery, Maine, 101 F.R.D. 767 (D. Maine 1984), plaintiff's counsel failed to respond to defendant's motion for summary judgment because of a clerical error by his secretary, which caused him to miss the deadline. In stating that such clerical errors, along with the press of other business, did not constitute excusable neglect, the Court stated that:

> "We do not consider the fact that an attorney is busy on other matters to fall within the definition of excusable neglect. Most attorneys are busy most of the time and they must organize their work so as to be able to meet the time requirements of matters they are handling or suffer the consequences." Picucci at 768, citing Pinero Schroeder v. Fed. Nat. Mortgage Assoc., 574 F.2d 1117, 1118 (1st Cir. 1978).

In discussing the rationale for its decision, the Picucci Court used the following reasoning:

> "In effectively processing the case-load of a busy docket, it is indispensable to the court's function that counsel take responsibility to respond to the local rule's demands as a matter of routine. Such a requirement is nothing other than a rationally-based compromise between the interest of litigants and their counsel and the needs of this court to have reasonably prompt notice of contest on

> matters which require its substantive action and the administrative attention of the Office of the Clerk." Picucci at 769.

The Schroeder opinion, cited by the Picucci Court, was one of a number of cases dealing with "excusable neglect" in the context of a failure to file a timely notice of appeal. In Schroeder, Petitioner's counsel claimed that he failed to file a notice of appeal because he was busy for a period of time with other work. The Court rejected this as a basis for excusable neglect. Schroeder at 1118. See, also, Airline Pilots v. Executive Airlines, Inc., 569 F.2d 1174 (1st Cir. 1978).

The Airline Pilots and Picucci cases were based, in part, upon the rationale of Spound v. Mohasco Industries, Inc., 534 F.2d 404 (1st Cir. 1976). The Spound Court dealt with a situation in which a plaintiff, after filing a limited appeal of a judgment, sought to enlarge the substance of the appeal, thereby creating a new appeal. The Court noted that plaintiff must show "excusable neglect" in order to obtain such an enlargement of the appeal. In defining excusable neglect, the Court stated that "excusable neglect calls for 'circumstances that are unique and extraordinary.' Maryland Casualty Co. v. Conner, 382 F.2d 13, 17 (10th Cir. 1967)." Spound at 411.

In further refining this definition, the Court went on to state that:

> "If this includes a mere palpable mistake by experienced counsel, the requirement would be meaningless. We may add that, after the original appeal had been filed, the case remained in the district court only for procedures 'in aid of the appeal.' [Citation omitted] We do not believe this includes passing on a motion to enlarge its substance. Finally, the rule makes no provision for plaintiff's contention that the defendant was not prejudiced. Such an exception would be limitless." Id.

All of these cases require that "excusable" neglect must include extraordinary circumstances over which the moving party had no control. Otherwise, relief will not be granted on a motion to vacate a judgment under F.R.Civ.P.60(b). The record clearly reflects that Petitioner's counsel has made no such showing here. Petitioner's counsel claims that he was busy with other matters, that his office was closed for a number of days, and that he was ill for a few days at the end of a six-week extension specifically granted for his convenience. (CDN-67, pp. 4-7) Although these matters may show neglect, Petitioner has made no showing which would excuse such neglect. As such, under the above-cited authorities, it was well within the District Court's discretion to deny

Petitioner's motion to vacate the judgment, based upon excusable neglect in his late filing of an opposition to Topa's Motion for Summary Judgment.

The case upon which Petitioner primarily relies in asserting error in the District Court's denial of the Motion to Vacate, Hibernia National Bank v. Administracion Central Sociedad Anonima, 776 F.2d 1277 (5th Cir. 1985), is easily distinguished. The Hibernia case dealt with a situation in which the Court granted a motion for summary judgment solely based upon the fact that defendant failed to file an opposition to the motion. In Hibernia the trial court did not consider the merits of the motion. In such a case, the Hibernia Court stated that three factors must be considered: "(1) the extent of prejudice to the plaintiff; (2) the merits of the defendant's asserted defense; and (3) the culpability of defendant's conduct." Hibernia at 1280.

However, this is not the case here. Here, the District Court was entitled to disregard Petitioner's proposed opposition to Topa's Motion for Summary Judgment. Since the District Court considered the merits of Topa's Motion, it also considered defenses disclosed in Topa's papers. The District Court also made an affirmative finding that there was no excuse for Petitioner's counsel's conduct. In such a case, there is no prejudice to Petitioner as a result of these proceedings. The excusable neglect presented in the Hibernia case included excusable ignorance by plaintiff's counsel that a deadline had passed. Id. at 1280. That is not the case here. Petitioner's counsel had adequate notice of the filing deadline, which was set for his convenience.

In sum, Petitioner's counsel is a member of the Bar of the United States District Court for the Central District of California, and swore that he had read the Local Rules and would abide by them. He failed to file a timely opposition to Topa's Motion for Summary Judgment, which was then determined to be meritorious and granted. There has been no showing of excusable neglect (or for that matter any excuse) by Petitioner or his counsel, and the Motion to Vacate the Judgment was properly denied by the District Court.

VI.

CONCLUSION

For the reasons set forth above, Respondent Topa Thrift and Loan Association requests that this Court deny Petitioner Richard M. Pachulski's Petition in its entirety.

Respectfully submitted.

Dated:
September 30, 1992 By _____

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